United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1305
& 76-1309

to be argued by Stanley E. Greenidge

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

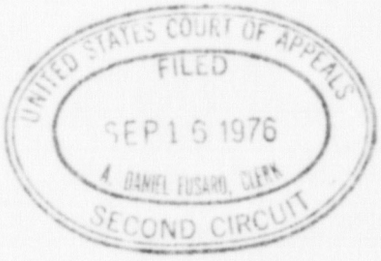
UNITED STATES OF AMERICA,
Appellee

v.

ANDREW CAVITOLO AND JOEL RAKOFSKY,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE



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I N D E X

C I T A T I O N S

Cases:

Cases (Cont'd.)

Rules (Cont'd.)

IN THE UNITED STATES COURT OF APPEALS
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ISSUE PRESENTED

Whether the district court properly denied the defendants' motion for dismissal under Rules 4 and 5 of the Eastern District Plan for the Prompt Disposition of Criminal Cases on the grounds that a 21 day delay beyond the six month period for the government to be ready for trial was justified by the absence of a material witness or exceptional circumstances.

RULES INVOLVED

Rule 4 of the Eastern District Plan for the Prompt Disposition of Criminal Cases, in effect at the time of the events pertinent to this prosecution, provides:

> All Cases: Trial Readiness and Effect of Non-Compliance.

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

Rule 5 of the Plan then in effect provides in pertinent part:

> Excluded Periods.
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> In computing the time within which the government should be ready for trial under Rule 3 and 4, the following periods should be excluded:
>
> (a) The period of delay while proceedings concerning the defendant are pending, including but not limited to

proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

* * *

(c) The period of time during which:

(1) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

* * *

(h) Other period of delay occasioned by exceptional circumstances.

STATEMENT*

The appellants (hereafter "defendants") were tried before a jury in the United States District Court for the Eastern District of New York (Judd, J.) on an indictment charging various offenses relating to extortionate credit transactions. Defendant Cavitolo was convicted on two counts of using extortionate means to collect an extension of credit

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* In this brief, "App." will refer to the joint appendix filed by the appellants; and "Tr." will denote the trial transcript.

and on a third count charging conspiracy to commit that offense (18 U.S.C. 894a). He was sentenced to one year imprisonment, all but sixty days of this being suspended, and fined $5,000. Defendant Rakofsky was convicted on two counts of using extortionate means to collect an extension of credit. He was placed on probation for two years and fined $1,000.[1/]

1. The Defendants' Extortionate Credit Collections.

The evidence showed that Joseph Perrone, the government's chief witness, began renting space from the Mermaid gas station in Brooklyn in May, 1974 (Tr. 515). Perrone was a mechanic, and used the space for repairing automobiles. The station was then managed by Sal DiBetta (Tr. 516). It was owned by Cavitolo's uncle, Louis Marterello, but Cavitolo was apparently responsible for maintaining the establishment. Cavitolo also owned a catering business across from the station, the Rivera Catering Hall (Tr. 520-521).

1/ Cavitolo was acquitted on two other counts charging conspiracy to make extortionate extensions of credit (18 U.S.C. 892) and financing extortionate extensions of credit (18 U.S.C. 893). Rakofsky was acquitted on a count charging conspiracy to collect an extension of credit by extortionate means (18 U.S.C. 894a). A co-defendant, Palma "Pat" Lombardi was also aquitted of a single charge under §892. In addition, co-defendant Anthony DeFilippo pled guilty prior to trial to a charge under §892.

In June, along with DiBetta, Perrone agreed to purchase the station. It was his understanding that the price would be $22,500, to be paid with a $5,000 down payment and subsequent monthly installments (Tr. 520-523). An agreement was signed at a June 3 meeting attended by Perrone, DiBetta, Cavitolo, Marterello, and an attorney (Tr. 523-527).[2/]

On June 21, Cavitolo approached Perrone and asked for an additional $3,000 for gas which had been in the station's pumps when the "sale" had transpired (Tr. 538). On Friday, June 29, Cavitolo again came to the station and asked for the gas money (Tr. 531). Perrone told him that two money orders had been stolen, though in fact he and DiBetta had recently expended station funds at a race track (Tr. 532). Cavitolo left but reappeared in fifteen minutes, accompanied by co-defendant DeFilippo. DeFilippo, who was carrying a gun in his waist, told others in the station to leave, and then told Perrone that "I had better have the money or else" (Tr. 534). Cavitolo told him that if he did not pay, his wife would be hurt (Tr. 536). He told Perrone that he wanted $1,000 by the following Monday (Tr. 537).

By Monday, Perrone realized that he was not going to be able to meet his obligations to Cavitolo, and thus he wrote him a letter purporting to terminate the agreement (Tr. 542-543). He then left town with his family (Tr. 545-546).

2/ Perrone never received a copy of the agreement which in fact was written as a lease (Tr. 525-526).

Perrone returned to the city on July 8. He was visited by Rakofsky on July 11, who was seeking payment on two checks Perrone had given him for tools he had purchased. Rakofsky said he could not secure payment unless Perrone verified the checks with his partner Dibetta.[3/] They called DiBetta who told them that "'[i]t is out of my hands,'" and that they should call Cavitolo. He was called and told them to come over to his catering shop (Tr. 547-548).

Rakofsky and Perrone drove to the Rivera parking lot, and Rakofsky went to get Cavitolo while Perrone waited there. As he waited, he was knocked to the ground by Filippo, who was weilding a coal shovel (Tr. 550-551). Cavitolo then began kicking him in the face and stomach and shouted at the others to "break his arms," before Rakofsky reminded him that "'If you break his arms he won't be able to work'" (Tr. 551). DeFilippo nonetheless proceeded to step on Perrone's arm and chop at his hand with the shovel (Tr. 552).

The beating stopped and Perrone was brought to the gas station (Tr. 552). There, Perrone was told that he would be found a job with which he could "work out" his debts to Cavitolo and Rakofsky (Tr. 553). Cavitolo ordered Rakofsky

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3/ DiBetta and Perrone's common-law wife Judy had authority to sign checks on the station's account (Tr. 530).

to meet Perrone each Friday and pick up his weekly earnings from the job (Tr. 555).[4/]

After his hand healed, Perrone did begin work as a mechanic at a local garage, as arranged by Cavitolo (Tr. 557). Rakofsky appeared the following Friday, and Perrone gave him his paycheck for the week. This scenario was repeated on August 2 and August 9. Perrone saw Cavitolo again on August 28, and was told that "as long as I paid there would be no problem" (Tr. 601).

2. The Evidence At The Motion To Dismiss Hearing.

The defendants' only contention is that the district court erred in not granting their motion to dismiss the indictment (App. p. 19) on the ground that the government was not ready for trial within six months of their arrest, as provided by Rule 4 of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases (hereafter, "the Plan")[4a/], Rule 50(b) of the Federal Rules of Criminal Procedure. Under Rule 4, " . . . the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of complaint or of a formal charge . . ., whichever is earliest." The facts relating to this motion are as follows.

4/ Cavitolo also ordered DiBetta to meet with Perrone's wife, close out the partnership account, and bring the proceeds to him (Tr. 556).

4a/ The district court rules were subsequently amended, effective September 29, 1975, in conformity with the Speedy Trial Act of 1974, 88 Stat. 2076, Pub. L. 93-619. That Act does not apply to the instant case. See, e.g., 18 U.S.C. 3161, 3163.

Defendants were arrested on September 27, 1974, based upon a complaint filed the same day in the district court (App. p. 11a). The indictment was filed on April 2, 1975 (App. p. 7-10). The defendants were arraigned on April 10, 1975, and requested until May 9 to prepare motions. Their dismissal motion was filed on May 8 and a hearing was subsequently convened on June 6. At this hearing, the government presented evidence to establish that during much of the period between the complaint and the indictment its chief witness in the case, Joseph Perrone, had been missing. Consequently, it was contended that under Rule 5(c)(i) of the Plan, much of the six month limitation of Rule 4 had been tolled. Rule 5(c)(i) provides that the six month period of Rule 4 does not include that time during which "evidence material to the government is unavailable."

Perrone had appeared before a grand jury investigating defendants on September 3, 1974. F.B.I. Agent Charles Domroe testified that following Perrone's testimony he was placed as a relocated witness in November of 1974 (App. p. 74-75). Under this procedure, persons who have or are cooperating in government prosecutions are relocated and given a new identity for their own protection (App. p. 43). In December, however, Domroe was called by United States Marshals in charge of the program and told that Perrone had voluntarily left the program (App. p. 48-49). Domroe did not immediately try to contact Perrone because, having been told

by the marshals that his departure had been voluntary, the agent thought that Perrone would contact him:

> I expected Peroni [sic] to call me. . . . He had in the past relied on me in a great deal of matters, because of that I expected him to call me. The U.S. Marshal told me he was detached from the program. He didn't at that time specify the reasons why he was detached. He said it was voluntary (App. p. 53).

When no word was heard from Perrone, Domroe in February contacted the United States Marshals and asked them to check the city of relocation " . . . to see if anything, any leads, could be developed from the location from where he was at the time (App. p. 53).[5/] Domroe contacted the Marshals again in March "to get more specific information as to where he might have gone," (App. p. 54). The Marshals, however, had been unable to find any leads as to Perrone's whereabouts (App. p. 55). Domroe then at the end of March contacted local F.B.I. agents in the city of Perrone's relocation who were able to learn of Perrone's mother-in-law's identity (App. pp. 56-58).[6/] Domroe called her in late March (App. pp. 44-45). She said that she would try to contact Perrone and his wife and have them call the agent. Thereafter, Perrone contacted Domroe in mid-April (App. p. 45).

5/ This is the context for Domroe's testimony cited by defendant Cavitolo (Br. p. 17) that he had not himself asked for Perrone's new alias and had not initially requested local F.B.I. agents in the relocation city to look for Perrone. Rather, he had relied on the Marshals' investigative resources.

6/ Domroe had known the name of Perrone's wife, but not that of the mother-in-law (App. pp. 57-58; p. 76).

The district court concluded that under Rule 5(c)(i) of the Plan much of the six month time limitation following the defendants' arrest had been tolled because of Perrone's unavailability.

> [The government] . . . had clearly shown probable cause for an indictment by January 13, 1975, when the last significant corroborative evidence was submitted to the grand jury. However, Mr. Perrone's absence at that time would have seriously jeopardized the trial of the action. Since he was not in custody and his address was unknown, he was "unavailable" (App. p. 91).
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> * * *
>
> The period of Mr. Perrone's absence, from late December to mid-April, is approximately 105 days. If that period is excluded, and the period granted for the making of motions and the time required by the court for the decision is excluded, as permitted by Rule 4(a) of the Plan, a government notice of readiness at this time would conform with the speedy trial rule (App. p. 92).

In the alternative, the court concluded that Perrone's absence from the relocation program constituted a " . . . period of delay occasioned by exceptional circumstances," under Rule 5(h) of the Plan (App. p. 93).

The government had indicated at the hearing on June 6 that it had not filed a notice of readiness following the defendants' arraignment on April 10, thinking it academic until the court ruled upon their dismissal motion (App. p. 20).

Following the district court's denial of the defendants' motion on July 1, the government filed its notice of readiness on July 8.

ARGUMENT

THE DISTRICT COURT PROPERLY CONCLUDED THAT MUCH OF THE SIX MONTH LIMITATION FOLLOWING THE DEFENDANTS' ARREST WAS TOLLED BECAUSE OF THE DISAPPEARANCE OF THE GOVERNMENT'S CHIEF WITNESS

The defendants' only argument in this case is to contest the conclusions of the district court that Perrone was unavailable under Rule 5(c)(i) of the Plan and that his absence constituted "exceptional circumstances" under Rule 5(h). As we will discuss below, Judge Judd's findings were correct and should not be disturbed on appeal.

Distilled from our Statement above, the time frame in which the defendants' argument arises is as follows. The defendants were arrested on September 27, 1974, and thus in the absence of any exclusionary periods under Rule 5 the government would have had to evince a readiness for defendants' trial by March 27. The defendants were ultimately indicted on April 2, arraigned on April 10, and the government's notice of readiness was filed on July 8.[7/]

7/ A notice of readiness is effective only after indictment and pleading has occurred. United States v. Bowman, 493 F.2d 594, 597 (2nd Cir. 1974).

The period between the April 10 arraignment when the defendants asked for time to file their motions and the district court's decision on July 1 is clearly excludable from the six month time limitation of Rule 4: the defendants do not here contest the district court's conclusion (App. p. 92) that under Rule 5(a) the six month limitation of Rule 4 does not include the period "while proceedings concerning the defendant are pending, including but not limited to . . . pre-trial motions ..." Thus, all parties are in fact in agreement that the government's notice of readiness was filed only 21 days (March 27 to April 10 plus July 1 to July 8) beyond the six month period beginning September 27. The precise issue here is whether the district court was warranted in tolling at least 21 days from this six month period in view of Perrone's absence.[8/]

Perrone Was Unavailable Under Rule 5(c)(i)

Since Perrone had left the relocation program and could not be found he was clearly unavailable under " . . . the application of the common sense meaning of the term 'unavailable.'" United States v. Flores, 501 F.2d 1356, 1360 (2nd Cir. 1974). The standard for "unavailability" under Rule 5(c)(i)

8/ The Plan mandates only that the government be ready for trial within a specified period of time, not that the actual trial be held within a particular period. Hilbert v. Dooling, 476 F.2d 355, 357 (2nd Cir. 1973), cert. den., 414 U.S. 878.

was established in Flores, supra and United States v. Rollins, 487 F.2d 409, 412 (C.A. 2) where this Court determined that a witness is unavailable if he would not be considered available for the purpose of an opposing party's invoking a missing witness instruction.

Under cases involving the missing witness instruction, if an individual is absent and cannot be found, he is considered unavailable. See United States v. Ferguson, 498 F.2d 1001, 1009 (D.C. Cir. 1974), cert. den., 419 U.S. 900; United States v. Dixon, 469 F.2d 940, 942, n. 4 (D.C. Cir. 1972); United States v. Super, 492 F.2d 319 (2nd Cir. 1974), cert. den., 419 U.S. 876. See II Wigmore §286 (3rd ed.); V Wigmore §1405 (Chadbourn Rev. 1974). The factual circumstances of Flores and Rollins, wherein unavailability under Rule 5(c)(i) was not recognized, are not apposite to the defendants' situation. The government's witness in Rollins was an undercover agent who was physically present but the prosecution did not want to use him until an investigation concerning his own activities had been completed. In Flores, the government's witness was also physically present, but simply declined to testify. In the instant case, by contrast, Perrone was simply not to be found.

The defendants, however, claim that the government did not pursue Perrone with "due diligence" as required for a finding of unavailability under Rule 5(c)(i). Their view that Agent Domroe did nothing to seek out Perrone "until late

March or early April" (Cavitolo Br. p. 17) is not reflected in the record of the hearing.

As Domroe stated, he had initially hoped, since Perrone had heretofore relied upon him, that the witness would contact him. As Judge Judd observed, "[t]here was ground to believe that Mr. Perrone might surface again" (App. p. 92). By February, however, when Perrone did not appear, Domroe began to actively pursue him, asking the United States Marshals "to check the city of relocation to see where he was, to see if anything, any leads, could be developed from the location from where he was at the time" (App. p. 53).

He contacted the Marshals again in March, and when they ultimately proved unable to locate Perrone, he secured the services of F.B.I. agents in the city of relocation who were ultimately able to determine the identity of Perrone's mother-in-law (App. pp. 56-58). He called the mother-in-law in March, and April, Perrone contacted him.

The agent's actions, we submit, were not the type " . . . which should terminate a criminal prosecution for a serious crime" (App. p. 92). Domroe assumed in good faith that Perrone would reappear and when such proved not to be the case, he initiated a search for the witness' whereabouts. The search did not, as suggested (Cavitolo Br. 23) entail a single phone call. Domroe had to first locate Perrone's

mother-in-law, using first the United States Marshals and then other F.B.I. agents in the city of relocation (App. pp. 55-58). Then, he had to call her (in March) and wait until Perrone contacted him in April (App. pp. 44-45).

As the Court noted in examining another section of the Plan, its terms " . . . must be construed with an awareness of the practicalities." United States v. Roemer, 514 F.2d 1377, 1381 (2nd Cir. 1975). Secondly, " . . . the Plan was not established primarily to safeguard defendants rights . . . [but also] to serve the public interest in the prompt adjudication of criminal cases," United States v. Flores, 501 F.2d 1356, 1360, n. 4 (2nd Cir. 1974).[9/] Here, once Perrone was located, the government was prepared to pursue the prosecution in a timely fashion.

Even if the agent were not justified in waiting until February to begin looking for Perrone -- an objection not entertained by the court below -- only that period between December and February would not be tolled in computing the six month period after the arrest date of September 27. The remaining period after February during which Domroe was actually looking for Perrone should still

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9/ See also Roemer, supra, 514 F.2d at 1381; United States v. Yagid, 528 F.2d 962, 966 (2nd Cir. 1976).

be tolled and that period more than covers the twenty-one "late" days following the initial March 27 deadline.[10/]

Even under Rule 4 of the Plan, and discounting the exception embodied in Rule 5(c)(i), dismissal of the instant indictment would have been inappropriate. The Court has of course recognized that " . . . there is no de minimus time period under the six months rule . . ." and that -- baring any applicable excludable periods, -- the government must be ready for trial precisely within six months. United States v. McDonough, 504 F.2d 67, 68 (2nd Cir. 1974). The sanction however, is not necessarily dismissal of the indictment. As the last sentence of Rule 4 provides " . . . the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days." In this case, the government did file its formal notice of readiness seven days after the district court's order was published. Thus, since Agent Domroe suffered at most a "mistake of judgment" (App. p. 92) any

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10/ The district court also concluded, and we agree, that Perrone's disappearance would fall under the exception of Rule 5(h) as a "period of delay occasioned by exceptional circumstances." As the court noted, "[a] witness' voluntary detachment from a relocation program is certainly an unexpected event" (App. p. 93).

"nontollable" delay under Rule 4 should be seen as excusable neglect in the absence of any bad faith on the part of the government or prejudice suffered by the defendants.

CONCLUSION

For the reasons stated, it is respectively submitted that the judgments of conviction should be affirmed.

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